SHEN YUAN PAI v. DATO WEE HOOD TECK & ORS.

[O.C.J. (B.T.H. Lee J.) November 4, 1974]
[Kuching — Civil Suit No. K 95 of 1970]

Contract — Building contract — Delay in completion of construction works — Delay in specialists' works — Position of Architect — Final certificate — Evidence of expert — Breach of professional etiquette — Failure of defendants to give evidence — Damages.

Evidence — Expert evidence — Failure of defendant to give or to call relevant evidence — Presumption — Evidence Act, 1950, ss. 106 and 114.

The defendants had contracted with the plaintiff for the construction by the plaintiff of certain works in relation to an office building in Thomson Road, Kuching. The plaintiff claimed that in spite of repeated requests he had not received payment from the defendants and he commenced action by a specially indorsed writ against them for the sum of $106,918 the balance which he alleged to be due to him for the completion of the construction of the building. The defence and counterclaim of the defendants was founded on, *inter alia*, delay in the completion of the construction work by the plaintiff, failure on the part of the architect to remeasure the reinforced concrete work in the building upon completion and the validity of the alleged final certificate issued and accordingly claimed for loss of profits and damages for non-completion of works contracted for within the time specified in the contract.

Held: (1) there was ample evidence in this case on which the court could find that the delay was solely caused by the defendants' default in not taking action with regard to the specialists' works and that such failure led to delay in the progress of the main contract works;

(2) as the architect in this case had issued his final certificate, thereby showing his satisfaction with the works carried out by the plaintiff, the plaintiff was entitled to the amount claimed;

(3) the certificate issued by the architect in this case was conclusive;

(4) on the evidence and the probabilities in this case the architect had remeasured the reinforced concrete works in the building and retaining wall and wharf on completion.

Cases referred to:-

(1) *Roberts* v. *Bury Improvement Commissioner* (1870) L.R. 5 C.P. 310.

(2) *Lodder* v. *Slowey* [1904] A.C. 442.

(3) *R.B. Burden Ltd.* v. *Swansea Corporation* [1957] 1 W.L.R. 1167.

(4) *Hosier & Dickinson Ltd.* v. *P. & M. Kaye Ltd.* [1971] 1 All E.R. 301.

(5) *Kaye* v. *Hosier & Dickinson* [1972] 1 All E.R. 121.

(6) *Sutcliffe* v. *Thackrah* [1974] 1 All E.R. 859.

(7) *Lawson* v. *The Wallasey Local Board* (1882) 11 Q.B.D. 229.

(8) *East Ham Borough Council* v. *Bernard Sunley & Sons Ltd.* [1965] 3 All E.R. 619.

(9) *East Ham Borough Council* v. *Bernard Sunley & Sons Ltd.* [1965] 1 W.L.R. 30, C.A., [1965] 3 W.L.R. 1096, H.L.

(10) *Robins* v. *Goddard* [1905] 1 K.B. 294.

(11) *Willesford* v. *Watson* (1873) L.R. 8 Ch. App. 473.

(12) *Thorp* v. *Holdsworth* (1876) L.R. 3 Ch. D. 637.

(13) *John Lancaster Radiators Ltd.* v. *General Motors Radiator Co. Ltd. & Ors.* [1946] 2 All E.R. 685.

CIVIL SUIT.

S. Sahathevan for the plaintiff.

T. O. Thomas for the defendants.

B.T.H. Lee J.: By a contract in writing dated November 16, 1965, the defendants contracted with the plaintiff, Messrs. Shen On Construction Co. (whom I will call the contractor) for the construction by him of certain works shown upon certain drawings and described in the specification entitled "Office Building, Thomson Road, Kuching" for the sum of $690,000.40. The contract was governed by *inter alia* 47 clauses styled the conditions and for the purposes of these conditions the architect was to be Mr. R. Hardie.

The contractor's case is that in spite of repeated requests he had not received payment from the defendants and has commenced an action by a specially indorsed writ against them for the sum of $106,918 the balance of which he alleged to be due to him from the defendants on completion of the construction of the Office Building, Thompson Road, Kuching.

The defence and counterclaim of the defendants is founded on, *inter alia*, delay in the completion of the construction work by the contractor, failure on the part of the architect to remeasure the reinforced concrete work in the building upon completion and the validity of the alleged final certificate issued and accordingly claimed for loss of profits and damages for non-completion of works contracted for within the time specified in the contract.

Delay in completion of construction works

It will be convenient to deal first with the delay in the completion of the construction works.

By the terms of the contract, the date for the completion of the contract was March 31, 1966 (Clause 2) but the architect may by Clause 29 extend the time for specific reasons.

For an understanding of the issues raised it is necessary for me to set out the sequence of events immediately leading up to this litigation.

Work on the construction had begun on April 28, 1964 (that is some 19 months before the Agreement dated November 16, 1965 was signed).

Attached to the Agreement is a letter dated June 29, 1965, (*i.e.* some 14 months after the construction of the building had commenced), and which forms part of the Agreement (Exhibit P2) addressed to M/s. Wee Hood Teck and Ang Cheng Ho by the Architect, R. Hardie. Two paragraphs of the letter at page 3 read as follows:

"Whilst on the subject of air-conditioning we would strongly recommend that this equipment be placed on order at the very earliest for until the air-conditioning engineers install their ductwork, the false ceilings cannot be installed, and again there is the matter of availability of plant.

On the main building works we should also be grateful for your advices regarding the work required to complete the building as there are items such as floor tiles, ceiling boards, etc. that require to be ordered and this cannot be done until an order has been agreed with the main building contractor."

According to the contractor's evidence he raised the question of specialist installations with the Architect and had reminded the latter that the specialist works had to be completed by the 1st week of February 1966 to allow him time to complete it by the agreed date *i.e.* March 31, 1966.

Furthermore on the second day of the signing of the Agreement *i.e.* November 17, 1965, another letter

was sent some 5 months later by the Architect to the defendants.

This letter it is to be observed, was sent nearly four months before the proposed date of completion namely March 31, 1966. The above two letters from the Architect got no response from the defendants.

Some 14 days before the due date of completion namely March 7, 1966, the contractor forwarded a letter to Mr. R. Hardie, with copies to Dato Wee Hood Teck and Ang Cheng Ho, Bian Chiang Bank, Ltd.

The letter is as follows:

"SIX-STOREY OFFICE BUILDING — THOMSON ROAD FOR DATO WEE HOOD TECK AND MR. ANG CHENG HO

We refer to your letter ref: 3/61/172 dated November 17, 1965 addressed to Dato Wee Hood Teck and Mr. Ang Cheng Ho, with copy to us, regarding the completion time of the above contract.

Since the specialist installations such as the electrical, sanitary, lift, air-conditioning and panel roofing have not yet started, we have to inform you that the above contract cannot be completed by March 31, 1966, and that an extension of time will be necessary.

We consider that a minimum period of eight weeks will be required for us to finish the builder's works after all the specialist installations have been completed.

We have to draw your attention to the fact that the cost of both labour and materials tends to increase nowadays and that any increase of cost after March 31, 1966 will be an extra to the contract.

Besides, our overhead expenses cover the contract period only. Any additional expenses due to the above mentioned delays will subject to additional claims."

I find it necessary to observe that the plaintiff's dealings were all through the medium of the Architect and not directly with the defendants.

The next event of importance is the letter of March 28, 1966 written by Dato Wee Hood Teck and Mr. Ang Cheng Ho addressed to Messrs. Shen On Construction Co. with a copy to Mr. R. Hardie:

"Six-Storey Office Building — Thomson Road

With reference to your letter of March 7, 1966 (ref: SK/K31/2794) on the building at Thomson Road we have noted the position.

On the question of extension of 8 weeks beyond March 31, 1966, we submit that we are totally at a loss to what the extent of damages we will have to bear as you are aware of the agreement made with our tenants to be. In view of this, we are compelled to agree to the extension but with reservations.

We do not accept the contention that we are responsible for rising costs in labour and materials as the agreement between us is clear. Nor do we accept liability for the overheads expenses referred in the last paragraph."

It was defendants' contention that the plaintiff obtained from the defendants an extension of time of 8 weeks beyond March 31, 1966, whereas plaintiff in paragraph 3 of his letter stated:

"We consider that a *minimum period of eight weeks will be required* for us to finish the builder's works *after* all the *specialist installations have been* completed."

It appears to me that the defendants proceeded upon a misapprehension when they said the extension was of eight weeks beyond March 31, 1966. Rather it is after all the specialist installations have been completed.

Eight weeks' extension would have brought the completion time up to the end of May 1966 and even at that time the specialist contracts had not been given to anyone of the specialists and work had not commenced nor completed by that period of extension.

The law on this is to be found on page 452 paragraph 862 of *Halsbury's* Laws of England, 3rd Edition, Volume 3, which reads as follows:

"Effect of failure of sub-contractors, or independent contractors ... If, however, the specialists are not sub-contractors of the builder but are employed by the building owner direct, then he will, in the absence of a contrary stipulation, be responsible to the contractor for delay caused by them."

The last specialist completed his work sometime at the end of June 1967 and this led to the building not being completed in time. It seems to me that paragraph 5 of the contractor's letter was abundantly clear.

The architect's letter of August 21, 1968 (page 18 of agreed Bundle of Documents) addressed to the defendants, paragraph 3 reads:

"Because of the lack of instructions or directives requested in our above-mentioned letter, we feel that the completion time on the building contract should be taken on the date of our letter, July 3, 1967, and the maintenance period ending on the 3rd January 1968."

There appears to be no evidence to show that there was any protest verbal or otherwise against this letter.

However after an interval of some three months the defendants wrote to the architect (page 15 of the Agreed Bundle of Correspondence) to say that they have appointed M/s. Frank and Vargeson to assist them "to measure the final quantities of the building and to assess the various claims made by their contractor."

I do not find in the letter any suggestion that there was delay in the completion of the construction of the building, nor does it seem to me to be anything in the language of it to justify such a suggestion.

From this it follows in my view that if the contractor can show he had been prevented by no fault of his own in keeping up to the agreed time for performance that is to say completion of his contract in due time the architect is under a duty to grant an extension of time.

The alleged default in the rate of progress with which the defendants were dissatisfied were caused by the defendants' own default in the fulfilment of their own part of the contract. That being so, the case fell precisely within the authority of *Roberts* v. *Bury Improvement Commissioner*[1] which was cited with approval in the judgment in the case of *Lodder* v. *Slowey*.[2]

The fact is undisputed that the defendants had taken no action in regard to the specialists' works so long that it was impossible for the contractor to fulfil the terms of his contract. The Architect had written two letters and the contractor had reminded the Architect with a copy to the defendants that the default of the defendants prevented his completing his part of the contract in due time.

On this point *Halsbury's* Laws of England, Volume 4, 4th Edition, Paragraph 1180 sums up the position as follows:

"If, by reason of a breach of contract or by reason of extra work ordered by him, the employer prevents the contractor from completing the work, by the date fixed or materially abridges the period limited for the execution of the work, then unless the contract clearly provides that the contractor shall take the risk of prevention by such extra work, the employer cannot insist upon completion by the date fixed or within the period limited, but only for completion within a reasonable time."

The case of *Roberts* v. *Bury Improvement Commissioners*[1] at page 325 makes the same point:

"The contractor also, from the nature of the works, could not begin his work until the commissioners and their architect had supplied plans and set out the land and given the necessary particulars; and therefore, in the absence of any express stipulation on the subject, there would be implied a contract on the part of the commissioners to do their part within a reasonable time; and, if they broke that implied contract, the contractor would have a cause of action against them for any damages he might sustain, and the commissioners would be precluded from taking advantage of any delay occasioned by their own breach of contract: for, it is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; see Com. Dig. Condition (L); and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract."

Reading "defendants" for "commissioners" in that passage it applies exactly to the present case.

It would be wrong therefore that the defendants should be allowed to profit by their omission to get on with the specialist installations. Upon the evidence I am of the opinion and I hold that there was ample evidence on which the court could find that the delay was solely by the defendants' default and that such failure led to delay in the progress of the main contract works.

Additional works

That takes us to the next part of the case namely additional works.

The issue here is the true construction of Clause 18 which provides for Claims for Extras:

"If the Contractor claims that any instructions, by drawing or otherwise, *involve extra cost under this Contract* he shall give the Architects written notice thereof...."

The cost of the contract is provided in Clause 3 of the Agreement (Exhibit P2) and reads as follows:

"The Employer agrees to pay the Contractor for the performance of the Contract the sum of *Dollars Six Hundred and Ninety Thousand and Forty Cents* subject to additions and deductions as provided in the General Conditions of the Contract and to make payments on account thereof as provided therein, as follows:-...."

Properly construed it is my view that any sum in excess of the sum of $690,000.40 would in the circumstances require that the contractor give the Architect written notice and not otherwise.

In my view upon a scrutiny of the clauses of the Agreement, and upon the evidence these additional works are covered by Clause 4 which reads:

"The Architects shall furnish, with reasonable promptness, *additional* instructions by means of Drawings or otherwise, *necessary for the proper execution of the work*, unless otherwise stated in the Specification."

Mr. Hardie is an Architect quite alive to the nature of his duty as to written authority. In his letter to the defendants dated November 16, 1965, the last paragraph reads as follows:

"None of these tenders will be accepted by us unless on your written authority."

What the contractor had contracted to do for a lump sum was to construct the Office Building Thomson Road, Kuching. Those works are not in any sense of the word "Extra works". The contractor had in my view correctly and properly called them additional works in his letter dated June 30, 1967 (see page 6 of Bundle of Correspondence).

Position of Architect

It is perhaps appropriate at this stage to examine the position of the Architect.

Clause 41 of the Contract Agreement provides that the Architects are not in any way to be responsible for payment, but to be considered as *Agents* only.

And Clause 45 — The Architects' Decisions — has this to say:

"The Architects shall, within a reasonable time, make decisions on all claims of the Employer or Contractor and on all other matters relating to the execution and progress of the work or the interpretation of the Contract Documents. The Architects' decisions, in matters relating to artistic effect, shall be final, if within the terms of the Contract Documents."

In the case of *R. B. Burden Ltd.* v. *Swansea Corporation*[3] a decision of the House of Lords, Lord Radcliffe said at page 1172:

"To take the architect first, it is obvious that his general function is to act on behalf of the owner, and he is the owner's agent to give the required instructions to the contractor. He is placed in office to protect the owner's interests. But in those parts of his duties which relate to the giving of certificates for payment I think that he stands apart from the owner and enjoys to some extent an independent authority of his own."

and at page 1173:

"But I do not see anything in the contract which suggests that the architect is bound to accept the surveyor's opinions or valuations when he exercises his own function of certifying sums for payment. At that point the architect remains master in his own field."

then at page 1177:

"It is true that the mistake originated in the corporation's office and we made by the officials of the surveying section: but the responsibility for accepting it and giving any direction in respect of it was the architect's, and the officials were for this purpose no more than his advisers or instruments."

In the case of *Hosier & Dickinson Ltd.* v. *P. & M. Kaye Ltd.*[4] which decision was affirmed on appeal to the House of Lords — (see *Kaye* v. *Hosier & Dickinson*[5]) — Lord Denning in discussing the question of arbitration before issue of final certificate said at page 304:

"... the architect is the agent of the employer and owes him a duty to take care not to issue a final certificate unless he is satisfied with the work."

and again at page 305:

"After all, the architect is the agent of the employers. He owes a duty to the employers to use due care in giving his final certificate. If he should negligently give a final certificate

barring the employers from a good claim, he would, I think, be liable in damages."

and lower down:

"If the architect was satisfied that the works had been properly completed, he was quite entitled to bring the matter to a close and to issue his final certificate. Once issued, it was conclusive."

See *Sutcliffe* v. *Thackrah*.[6]

Final Certificate

The position as regards Form of Certificates is stated in *Halsbury's* Laws of England (Volume 3), 3rd Edition, page 463:

"338. *Form of Certificate.* The form of the final certificate depends on the terms of the contract; for instance, if the architect is merely required to certify, and no written certificate is expressly required, an oral statement of his satisfaction is sufficient. Apparently on the analogy of an award, the mere use of the word 'certificate' and a direction that the certificate shall be 'delivered' does not imply that the certificate must be in writing."

The relevant portion of Certificates and Payments is dealt with in Clause 39 of the Agreement (Exhibit P2), and reads as follows:

"The Architects shall, not later than the date when each payment falls due, issue to the Contractor a certificate for such amount as they decide to be properly due."

The Architect wrote to the employers on August 21, 1968 (page 18 of Agreed Correspondence) informing them that the building had been completed and occupied and enclosed Final Statement of Account in respect of the contractor M/s. Shen On Construction.

The second and the last paragraphs of the letter are in these terms:

"In respect of completion, we would refer to our letter 3/61/A260 dated July 3, 1967, and yours of October 12, 1967. As we have had no further instructions to date, and because of the pressure on this office regarding outstanding payments due to the Contractors, we have no alternative but to submit these bills for immediate payment.

....

It would be appreciated if an early settlement could be made in respect of this final payment because of the long outstanding nature of the account."

The point taken by counsel for the defendants is that the above letter of August 21, 1968, written by the Architect was not in specified form and is therefore not a certificate within the meaning of Clause 39 of the Contract and he cited the case of *Lawson* v. *Wallasey Local Board*[7] in support thereof. That case is far removed from the circumstances of the present case. That was a case where counsel for the plaintiff admitted that none of the forms required by the Act were complied with, apart from failure of consideration and no document other than the original contract was under the seal of the Board. That this is so, seems clear.

The definition of a certificate is set out in *Halsbury's* Laws of England, Volume 3, 3rd Edition, Paragraph 875 at page 458. It reads:

"As building owners and employers have not usually the technical knowledge necessary to ascertain whether the builder or contractor is observing the stipulations of the contract as to the work and materials to be employed, an architect or engineer, or some other fit person, is employed to supervise the work, and it is necessary for this person to express in some formal way his approval of the work done and materials actually employed. This approval is expressed in certificates; ...."

As no form is prescribed, it is in my view for the Architect to determine the form and nature of certificate as he may think fit.

The gist of the decision as regards conclusiveness of final certificate is set out neatly and concisely by Lord Upjohn in the House of Lords' case of *East Ham Borough Council* v. *Bernard Sunley & Sons, Ltd.*[8] at page 634:

"The first question is whether, on the true construction of the conditions, a final certificate issued by the architect is conclusive evidence as to the sufficiency of the works subject only to the exceptions mentioned in clause 24(f) of the contract. Melford Stevenson, J., came to the conclusion that it was not, but thought that it was only conclusive evidence as between the building owner and the builder until power to re-open it vested in an arbitrator appointed pursuant to clause 27. In the Court of Appeal, reversing Melford Stevenson, J., on this point, it was unanimously decided that a final certificate was final and conclusive save as to the exceptions stated in the sub-clause."

On conclusiveness of a final certificate, *Halsbury's* Laws of England Volume 4, 4th Edition, page 616 Paragraph 1209 says:

"*Conclusiveness of a final certificate.* Except in cases where there is an arbitration clause entitling an arbitrator to review the decisions of the architect as to the amount due or as to whether the works are in accordance with the contract, or where the architect is disqualified from certifying or where the certificate may otherwise be dispensed with, the final certificate will be conclusive."

In my judgment the intention of the parties was expressed in terms by the Agreement that the satisfaction of the Architect was to be expressed in his final certificate which unless there has been a request for arbitration is conclusive evidence that the works had been properly carried out and completed in accordance with the terms of the contract.

There really can be no matter of doubt that the Architect had by his letter dated August 21, 1968 so expressed his satisfaction to the defendants and I am accordingly of the opinion and I hold that the contractor is entitled to the amount claimed.

Arbitration

I pass to a consideration of the question that has been taken and which depends on the construction of the agreement.

Clause 39 of the Contract deals with Certificate and payments and reads:

"The Architects shall, not later than the date when each payment falls due, issue to the Contractor a certificate for such amount as they decide to be properly due."

and Clause 45 speaks of Architects' Decision and is in these terms:

"The Architects' decisions, in matters relating to artistic effect, shall be final, if within the terms of the Contract Documents."

Clause 46 provides for Arbitration and (omitting the irrelevant parts) reads as follows:

"Provided always that in case any dispute or difference shall arise between the Employer or the Architects on his behalf and the Contractor either during the progress of the works or after the determination, abandonment, or breach of the Contract, concerning the works or of the execution and maintenance thereof of the meaning or construction of the Contract or as to any matter or thing arising thereunder (...) or as to the withholding by the Architects of any certificate to which the Contractors may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference,

and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person or persons to be appointed on the request of both parties; ... The arbitrator shall have power to open up, review, and revise any certificate, ... and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate ... had been given. ..."

It was held in the case of *East Ham Borough Council* v. *Bernard Sunley & Sons, Ltd.*[9] a Court of Appeal decision which was affirmed on appeal to the House of Lords — [*1965*] *3 W.L.R. 1096* — that on the true construction of the contract Clause 27 was subject to Clause 24(f), and the general power to open up, review and revise any certificate given by Clause 27 did not deprive a final certificate of the conclusive effect given to it by Clause 24(f).

The question to be decided in the present case is, as was the case in *East Ham Borough Council's* case, whether on the terms of the present contract, the final certificate is subject to revision by the arbitrator.

That case revolves on the construction of two clauses *e.g.* Clause 24(f) and the Arbitration Clause (Clause 27).

Clause 24(f) in terms provides that:

"upon expiration of the defects liability period ... the architect shall issue a final certificate of the value of the works executed by the (Contractors) and such final certificate, save in cases of fraud, dishonesty or fraudulent concealment relating to the works or materials or to any matter dealt with in the certificate, and save as regards all defects and insufficiencies in the works or materials which a reasonable examination would not have disclosed, shall be conclusive evidence as to the sufficiency of the said works and materials."

The Arbitration Clause (Clause 27) empowered the arbitrator *inter alia:*

"to open up, review and revise any certificate ... and to determine all matters in dispute which shall be submitted to him ... in the same manner as if no such certificate ... had been given."

It seems to me that in substance this is precisely the argument that was put forward in *East Ham Borough Council's* case. In that case as in the case here Clause 45 is couched in substantially the same form.

Whereas Clause 24(f) speaks of "conclusive evidence" as to sufficiency to the said works and materials, Clause 45 merely says "The Architect's decisions, in matters relating to artistic effect shall be final," if within the terms of the contract document. Both arbitration clauses are also cast in terms substantially the same in its effect.

It was however urged on behalf of the defendants that following the authority of the case of *Robins* v. *Goddard*[10] their case is very similar to *Robin's* case and there is no provision making the award of the arbitrator a condition precedent to bringing an action.

It must be observed that the terms of the contract in *Robin's* case was a very different one to that in this case. The provision of the clause being different the one case is no authority in the other. Clause 30 in that case provides *inter alia* that:

"... The architect shall issue his certificates in accordance with this clause. *No certificate of the architect shall be considered conclusive evidence* as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from the liability to make good all defects as provided by this agreement. ..."

In the case with which I have to deal Clause 45 like Clause 24(f) in *East Ham Corporation's* case speaks of "the Architects' decisions in matters relating to artistic effect shall be *final*" and such final certificate ... shall be conclusive evidence as to the sufficiency of the said works and materials.

That, to my mind makes all the difference.

Viscount Dilhorne in *East Ham Corporation*[8] said at page 1106:

"Further, it appears to be thought in some quarters that, if special powers are given to an arbitrator, they devolve on the court should there be litigation. I do not regard the decision in *Robins* v. *Goddard* as establishing or, indeed, supporting such a proposition. In that case, as I understand it, the Court of Appeal held that the arbitration clause, which gave power to an arbitrator to open up, review and revise a certificate, showed beyond doubt that the certificates in that case were not conclusive and, the certificate not being conclusive, the court was not obliged to treat them as if they were."

Lord Denning M.R. in *Hosier & Dickinson Ltd.* v. *P. & M. Kaye Ltd.*[4] said:

"If the architect was satisfied that the work had been properly completed he was quite entitled to bring the matter to a close and to issue his final certificate. Once issued, it was conclusive."

I am quite aware that there may be some difference in wording between the agreement in that case and in the case before me, but I do not think it can make any distinction in principle on that ground.

My view of the construction of the terms of the contract being that which I have expressed I have come to the conclusion and I find as a fact that the Certificate given by Mr. Hardie is conclusive. It is not without significance that no application to stay the action had ever been made by the defendants under the provisions of the Sarawak Arbitration Ordinance.

The defendants as I have before intimated if dissatisfied could have requested an arbitration under Clause 46 of the Contract.

But even if I am wrong in the view I have expressed on arbitration, there are in my judgment other grounds on which it can be said that the plaintiff must succeed.

Remeasurement

I now turn to Paul Yong's evidence (DW1).

The questions here fall to be considered are under two heads:

(1) Remeasurement; and

(2) Professional etiquette.

It is to be observed that the Contract Documents (Exhibit P2) included a letter dated April 28, 1964 addressed to Messrs. Wee Hood Teck and Ang Cheng Ho by R. Hardie, which forms part of the Agreement, the last paragraph of which reads as follows:

"Enclosed is a copy of our acceptance letter to the Contractor, where you will note, the reinforced concrete work is *subject to remeasurement by this office.*"

The paragraph, it is important to notice is expressed in these terms "subject to re-measurement by this office", and it is one which the parties contemplated and agreed. This recital as it seems to this court was sufficient to put Paul Yong on his guard.

The word "re-measurement" was mentioned no less than seven times; *viz:*

a) twice in letter dated November 16, 1965;
b) thrice in letter dated June 29, 1965;
c) once in letter dated April 28, 1964, addressed to M/s. Wee Hood Teck and Ang Cheng Ho;
d) once in letter dated April 28, 1964 addressed to Shen On Construction Co.

These were correspondence exchanged between the parties and the architect prior to the signing of the Agreement on November 16, 1965.

Put as shortly as possible the contention of the contractor was that whereas on April 28, 1964, the reinforced concrete work was subject to remeasurement by November 16, 1965, (*i.e.* some 19 months later) upon remeasurement the initial quotation of $88,800 was increased by a further $100,138 (see page 15 of Record).

The contractor called in support of his evidence Wong Ik Kah (PW5) a Civil Engineer in the employ of Shen On Construction the Contractor. PW5 deposes to the fact that he is a Civil Engineer, Hongkong East Asia College — Chinese medium. He said frankly that his qualification is recognised in Taiwan but not recognised by the Hongkong Government, nor by the Malaysian Government.

He said in cross-examination which I accept that he was employed by Shen On as an Engineer and not in the capacity of a foreman.

According to PW5 the re-measurement was done by him in June 1965 and it was confirmed by Hardie and such calculations were set out in Exhibit P21.

In regard to the reinforced concrete work on the retaining wall and wharf, Hardie's letter to the defendants dated May 29, 1965, in Exhibit P2 sets out the quotation for the retaining wall, wharf and car park as $120,000.

The last paragraph of that letter at page 2 reads:

"Additional to the above-mentioned costs are the external work which comprise the retaining wall to the river, the small wharf to cater for car parking requirements as set out by K.M.C. filling between the retaining wall and the concrete standing to the site area. The estimated costs for this work is $120,000 which as in the case of the reinforced concrete work, will be subject to re-measurement."

Whilst on the subject I need only refer to *R. B. Burden Ltd.* v. *Swansea Corporation*[3] to which reference has been made under the heading "Position of Architect" where Lord Radcliffe in the course of his speech said at page 1173:

"But I do not see anything in the contract which suggests that the architect is bound to accept the surveyor's opinions or valuations when he exercises his own function of certifying sums for payment. At that point the architect remains master in his own field."

and at page 1177 he had this to say:

"...; but the responsibility for accepting it and giving any direction in respect of it was the architect's, and the officials were for this purpose no more than his advisers or instruments."

The same principle to which reference was earlier made was enunciated in *Hosier & Dickinson Ltd.* v. *P. & M. Kaye Ltd.*[4] (a decision affirmed on appeal to the House of Lords in *Kaye* v. *Hosier*[5]) where Lord Denning said at page 305:

"After all, the architect is the agent of the employers. He owes a duty to the employers to use due care in giving his final certificate. If he should negligently give a final certificate barring the employers from a good claim, he would, I think, be liable in damages." (See *Satcliffe* v. *Thackrah* [1974] 1 All E.R. 859, a recent House of Lord's decision.

and lower down:

"If the architect was satisfied that the work had been properly completed, he was quite entitled to bring the matter to a close and to issue his final certificate. Once issued, it was conclusive."

On the evidence and the probabilities I hold and find as a fact that Wong Ik Kah had re-measured the reinforced concrete works in the building and retaining wall and wharf on completion. In making that finding of fact I accept the evidence of Wong Ik Kah as to the fact that he went over the measurement with Hardie as described by him.

It is I consider worth noting that throughout Paul Yong's calculations were based at the rate of $111 for each cubic yard of concrete simply by dividing the plaintiff's quoted price of $88,800 by 80 cubic yards of concrete.

The rate of $111 for each cubic yard will be correct only if the ratio of steel bars against the concrete is 80 tons of steel bars to 800 cubic yards of concrete or 1: 10 ratio.

The actual drawings issued show the ratio of steel bar against the concrete as being much higher. It necessarily follows that the amount of steel in excess of the original ratio should be taken into account.

The price of steel had increased between March 25, 1964, when the quotation was given and June 18, 1965, when the re-measurement was done. The architect had obviously taken this increase in steel prices into account.

It is to be noted that Paul Yong's ratio of $111 for each cubic yard of concrete is for both the building as well as the retaining wall and wharf.

He said he had assumed that the mix for the wharf and the building is of the same ratio and does not admit that the higher the ratio of concrete the higher the cost and the ratio of 1: 1½: 3 is a higher grade.

In his evidence he said he only "assumes" that the ratio is the same.

It seems clear from Exhibit P3 the drawings upon which the plaintiff constructed the building for the defendants that the ratio of concrete mix used must differ according to whether the construction is used for the building or for retaining wall and wharf.

Paul Yong proceeded on the assumption that the concrete mix used for the building and the wharf, the wall of the lift and the piling for the wharf is the same.

In the argument presented to the court, counsel takes the point in my opinion correctly, that unless Paul Yong was present at the site the building of the stage for driving concrete piling into the river, pumping river, working overtime at nights because of river tides

and the like, he cannot possibly express his assessment in any arithmetical or quantitative way. His assessment is at best nothing more than a speculation and must remain conjectural.

Looking at Drawing RC No. 3 of Exhibit P3 it clearly shows reinforced concrete wall at lift well. Yet Paul Yong in his evidence says he assumed that the lift well may be brick or may be concrete. It is clearly an assumption far removed from the true state of affairs.

Again in his evidence he said he had not measured the strong room and indeed expressed doubts whether there was one.

Paul Yong had upon the evidence blundered once in 1967. If his 1971's valuation is the same as the assessment given by him to Ang Lai Soon in 1967 then he was held to be wrong as stated by Mr. Hewitt in his letter.

If however his 1971's assessment differed from the 1967's assessment, then he is equally wrong. His evidence is not only inconsistent with much that he had said but is directly in conflict with each assessment.

The law on the value of an expert evidence is found in *Phipson* on Evidence, 10th Edition, paragraph 1286, page 481. It reads:

"The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of preconceived theories, moreover, support or opposition to given hypothesis can generally be multiplied at will."

Professional etiquette

With that I must turn to the second of these questions.

I pause here to say that I do not however understand the reason why the defendants decided to employ Paul Yong to check the contractor's claims and quantities. Such a step seems to me to be completely ignoring the Arbitration Clause 46 of the Agreement.

Lord Selborne in *Willesford* v. *Watson*[11] said:

"If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament was passed a *prima facie* duty is cast upon the courts to act upon such an agreement."

There is it seems to me nothing in the present case to take it out of the ordinary rule.

Nor in my opinion were any steps taken under section 6 of the Sarawak Arbitration Ordinance (Cap. 45).

Paul Yong was chosen at the defendant's suggestion. Neither the contractor nor the Architect, Mr. Hardie, was informed of the step taken of his appointment and apparently without the consent of the Architect.

Paul Yong has said he knew that Hardie was the Architect employed by the defendants for the construction work. A reasonable surveyor would have been put on enquiry as to the propriety of undertaking a work of such nature.

Paul Yong is a registered Architect and Quantity Surveyor of Malaysia, Member of the Faculty of Architects and Surveyors London. Paul Yong's qualifications were acquired at the Singapore Polytechnic and he is a registered architect and a quantity surveyor of Malaysia.

Rule 27 of the Architects Rules 1973 made pursuant to section 35 of the Architects Act of Malaysia, 1967, provides:

"A person registered under the Act shall in the exercise of his profession observe and be guided by the provisions of the Code of Professional Conduct in the Third Schedule as are applicable to him."

Rule 5 of the Third Schedule reads:

"A person registered under this Act shall at all times with due regard to the interest of his client or employer, act loyally towards his professional colleagues."

Paul Yong as it seems to me has ignored this Rule. Hardie is a professional colleague in his capacity as an architect.

It is necessary to pause here for a moment to make some observations of the letter written by Mr. Hewitt to R. Hardie (Exhibit P43) part of the first paragraph of which reads as follows:

"I am unhappy about the whole business as he was *expressly instructed to contact us before taking any action.*"

Paul Yong, as it appears to me, chose to ignore his firm's instructions just as he had ignored the professional code.

He was unable to give an explanation that I could regard as satisfactory.

Typical of the answers he gave runs as follows:

"It did not occur to me to get either Hardie or Shen On to be present when I measure the quantities. My fees were being paid by Harry Tay and no fees were paid by Shen On Construction.'

Clause 4 of the *Code of Professional Conduct in the Third Schedule of the Architects' Rules* made under Rule 27 of the Architects' Rules provides:

"a person registered under the Act shall at all times apply the conditions of the contract with entire fairness between his client, his employer's client or his employer and the contract, and in all questions arising between his client, his employer's client, or his employer and the contractor, and in all cases in which he has been acting between parties he shall act in an impartial manner."

That Paul Yong is quite aware of the professional code is quite clear. He said in cross-examination and I quote:

"... If another person wishing to take over from that person, you must write to the Architect whether he has any objection for that person to take over the job from him."

I am however unable to escape the conclusion upon the evidence that he deliberately shirked his plain duty by turning a blind eye to his obligations.

Paul Yong is also a member of the Faculty of Architect & Surveyors, London. That being so, Rule 24(9) of the Rules of Conduct Disciplinary Powers and Procedures of the Royal Institution of Chartered Surveyors, London provides as follows:

"(9) Subject to paragraph (13) of this Bye-law and the Regulations no Member shall solicit instructions for work in any manner whatsoever; provided that this rule shall not apply in the case of a regular client unless the Member know or

ought to have known that the work in question had already been entrusted to another professional adviser."

(Paragraph 13 provides for matters of estate agents in England and Wales and is not relevant here.)

Paragraph (j) of the Conditions of Engagement of the Conditions and Engagement and Scale of Professional charges of the Malaysian Institute of Architects — reads as follows: —

"*Termination of engagement*

"The appointment of an architect shall be on the understanding that no other architect is currently on the same work for the client and that the previous appointments has been properly terminated."

The fact must not be lost sight of that Paul Yong was commented adversely by the senior partner of Messrs. Frank & Vargeson of which he was appointed Manager in 1967.

In my judgment nothing could be more unprofessional than for a quantity surveyor to go over the work of another without first informing the later of the position.

His good sense and sense of honour coupled with his respect for his profession ought to dictate whether that piece of work ought in conscience to be done — without first ascertaining from the previous architect.

When the letters (Exhibits P43 and P44) were shown to Paul Yong, his attitude became one of extreme discomfort. He was visibly disturbed which with all his powers of control he was not able entirely to conceal.

He cut a forlorn figure in the witness box. His whole demeanour wore a strained look. He felt trapped and helpless and sought unconvincingly to clear himself.

He admitted he knew Hardie was the architect. In my opinion professional courtesy casts upon him the duty of making enquiry in regard to these matters.

He was a most evasive witness who continually shifted his ground when faced with the truth. He made a feeble attempt at denying that it was he who was the Assistant referred to in the letter (Exhibit P43) when Exhibit P44 bearing the same date and was annexed to P44 for the information of Mr. Hardie.

In the circumstances I am driven to the conclusion that Paul Yong's evidence is unsatisfactory and I cannot place any reliance on his evidence.

Damages

The plaintiff claims damages, particulars of which are as follows:

1.	Third Party Insurance Premium	300
2.	Workmen's Compensation Insurance Premium	700
3.	Cost of maintenance of temporary hoardings	1,500
4.	Renting of storage space	600
5.	Cost of electricity and wages for watchman	4,500
6.	Salary paid by plaintiff to Engineer, foreman and Clerks for 15 months at $2,530 a month	37,950
	Total	$45,550

Chitty on Contracts, 23rd Edition Page 545 Paragraph 1153 reads:

"If the other party to the contract prevents the plaintiff from completing his performance, the plaintiff may either recover damages for breach of contract, or alternatively sue upon a *quantum meruit* to recover a reasonable remuneration for his partial performance."

Receipts were produced by the plaintiff in support of all the five items save Item 3.

On Item 3, Clause 8 of the Agreement provides as follows:

"8. *Local Authorities, Notice, etc.* The contractor shall conform to the provisions of the relevant Council or other Authorities and erect all hoardings ... which shall be paid by the Employer...."

The inability to produce the receipts for this item was explained by the plaintiff and I am satisfied on the evidence that this is a necessary expenditure. Plaintiff gave as his figure $1,500 calculated on the basis of $100 per month for 15 months, which amount I accept as being fair and reasonable.

Plaintiff has by paragraph 13 of his pleadings claimed interest on the sum of $106,918 at the rate of 8% per annum from August 21, 1968, until payment.

This is merely following the provisions of Clause 39 of the Agreement which (omitting the irrelevant portion) reads:

"Should the owner fail to pay the sum named in any certificate of the Architects or in any award by arbitration, upon demand when due, the Contractor shall receive, in addition to the sum named in the certificate interest thereon at the rate of 8% per annum."

For the reasons I have given I find that the plaintiff is entitled to the damages claimed and to the sum of $106,918 at the rate of 8% per annum from August 21, 1968 until payment.

Witness — absence of

Although available none of the defendants had elected to give evidence in this case. Ang Lai Soon's (DW2) evidence was however confined to a brief reference to Exhibit P44.

The defendants have not called Hardie their agent to give evidence in support of their case. Nor does there seem to have been any attempt made asking for a commission to be issued to take his evidence in England, assuming he was unable to make the journey to Sarawak. At all events the defendants must show that *bona fide* attempts have been made to get him to come over to Kuching. This omission I regard as significant.

Section 106 of the Evidence Act reads:

"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

On page 1004 of *Sarkar* on Evidence, 12th Edition, the following passage occurs under the caption of "Presumption from not calling witnesses acquainted with facts and keeping the adversary out of possession of Evidence":

"Everything is to be presumed against a party who keeps his adversary out of possession of evidence by taking means of retaining the evidence in his own custody. A similar presumption may also arise when a party does not call witnesses who are within reach and are acquainted with the facts of the case. (*Sooriah* v. *Cataghery* 2 M.I.A. 113, 125; *U Po* v. *Edward* A. 1934 R. 139; *Trailakhya* v. *Kenaram* 61 C.L.J. 551). When a party failed to call as his witness the principal person

involved and who was in a position to give first hand account of the matter in controversy and who could have refuted an oath the allegation on the other side, it is legitimate to draw an adverse inference. (*Seth Magemmal* v. *Darbarilal* 47 C.L.J. 222; 54 M.L.J. 208; A. 1928 P.C. 39; *Bajranglal* v. *Sitaram* A. 1949 C. 457). Court may draw adverse inference against a party who being in a position to adduce better evidence deliberately abstain from doing so. (*Murugesa* v. *Grana* 44 I.A. 98, 4 O.M. 402; *Gopal Krishnaja* v. *Md. Haji* A. 1937 M. 182; *Radhikaran* v. *French Motor Car Co.* — A. 1955 or 60; *Pranballav* v. *Tulsiba* A. 1958 C. 713; *Demath* v. *S.A.* 1967 B1). Persons omitting to produce their best available evidence cannot take advantage of the abstract doctrine of onus of proof."

Counterclaim of $30,000

By their defence and counterclaim the defendants alleged that the building was constructed not in accordance with the plans and specifications approved by the local authority and they have counterclaimed the sum of $30,000 which was the estimated sum required to put the building right in order to comply with requirements of the Kuching Municipal Council so as to obtain the necessary occupation permit.

The five conditions mentioned in Exhibit D9 on page 18 of the Bundle of Pleadings were not the normal standard requirements of the Kuching Municipal Council. There were according to the Senior Building Inspector, Tan Kok Hwa (PW2) special conditions, of the contents of which the plaintiff was ignorant, the architect having failed to communicate them to the plaintiff. The conditions D. & E. are, as it seems to me the responsibility of the specialist contractor for sanitary installations and not the contractor.

This claim was never very strongly pursued and was in fact ultimately abandoned, and it need not therefore further be considered.

By paragraphs 13 and 14 of the Defence and Counterclaim the defendants have counterclaimed $101,400 and $122,850 respectively for prospective loss of rent.

See *Halsbury's* Laws of England, 3rd Edition Volume 11 Page 218 Paragraph 386 — Special Damages.

"... In contrast to general damages special damages must be claimed specifically and proved strictly, ..."

DW3 Harry Tnay gave evidence as to renting out of the premises. He said he merely enquired in 1970-1971 for building office space. He did not state that the office space was in fact to be rented out.

He admitted that he had no qualification, merely accounting experience.

Such being the state of evidence, it cannot be said that the defendants have discharged the onus that is laid by law on them. In my judgment the evidence fell far short of proving the damages which the defendants seek by way of counterclaim.

If there is a loss it was not sustained in consequence of the delay on the part of the plaintiff while in fact it arose from the neglect and inactivity of the defendants themselves and as I have earlier held the delay was entirely a consequence from the default of the defendants in not appointing the specialists to do their work in time.

In the circumstances I cannot say as a matter of law that the defendants are entitled to the damages sought.

It remains now only to deal with the point raised by counsel for the defendants that the liability of second defendants had not been proved.

It is desirable at this point that I should deal again with Ang Lai Soon's (DW2) evidence. He stated that Mr. Hewitt wanted him to return a letter which Paul Yong addressed to Dato Wee and stated the following "estate of my late father" (see page 80 of record).

There is however another additional fact that in their two letters, one undated and the other dated October 12, 1967 (pages 15 and 16 of Agreed Correspondence), Ang Lai Soon (DW2) and Ang Cheng Khoon have described themselves as Executors-Designate of the estate of Mr. Ang Cheng Ho (deceased).

Counsel for the plaintiff pointed out and it is undoubtedly true that the defence had not specifically denied or traversed the allegation in paragraph 1 of the Statement of Claim.

The question is what "if not denied specifically" means. The answer is to be found in Order 19 rule 17 which reads:

"It shall not be sufficient for a defendant in his defence to deny generally ... but each party must deal specifically with each allegation of fact of which he does not admit the truth. ..."

See *Thorp* v. *Holdsworth*[12] and *John Lancaster Radiators Ltd.* v. *General Motors Radiator Co. Ltd. & Ors.*[13]

It is further to be observed that counsel for the defendants indicated to the court at the close of the case for the plaintiff that he will not call any of the defendants to give evidence.

As however, in view of the trend of evidence, and having regard to the provisions of section 114(g) of the Evidence Act, 1950, it was incumbent for Ang Lai Soon (DW2) to give evidence limited only to the production of a letter (Exhibit P44).

In the circumstances I cannot think that this is a valid argument, and consequently the defendants' contention on this point fails.

In the result there will be judgment for plaintiff with costs and the defendant's counterclaim must be dismissed.

Judgment for plaintiff.
Counterclaim dismissed.

Solicitors: *Battenberg & Talma; Thomas & Co.*